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No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1957

o———o———o

Public Service Commission of Utah and Utah Citizens Rate Association,

Appellants,

v.

United States of America and Interstate Commerce Commission,
The Denver and Rio Grande Western Railroad Company,
Union Pacific Railroad Company,
Southern Pacific Company,
The Western Pacific Railroad Company,
Utah Railway Company,
Bamberger Railroad Company,
Tooele Valley Railway Company,
Salt Lake, Garfield and Western Railway Company,
The Ogden Union Railway and Depot Company,

Appellees.

o———o———o

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

o———o———o

OPPOSITION TO APPELLANTS' MOTION TO TAX COSTS AGAINST RAILROAD APPELLEES

o———o———o

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

OPPOSITION TO APPELLANTS' MOTION TO TAX COSTS AGAINST RAILROAD APPELLEES

Appellants' motion (typewritten copy of which was received July 30, 1958, by counsel for the railroad appellees) moves the Court for an order taxing the full amount, $4,723.03, of the costs of their appeal against the railroad appellees, The Denver and Rio Grande Western Railroad Company, Union Pacific Railroad Company, Southern Pacific Company, The Western Pacific Railroad Company, Utah Railway Company, Bamberger Railroad Company, Tooele Valley Railway Company, Salt

Lake, Garfield and Western Railway Company, and The Ogden Union Railway and Depot Company.

The amended complaint in the District Court named the United States of America and the Interstate Commerce Commission as defendants but did not name the above-named railroads as defendants (R. 1). Those railroads, however, were allowed to intervene in the District Court as parties defendant (R. 27), but were brought here as "intervenors" named in appellants' notice of appeal to this Court (R. 75).

Paragraph 2 of the motion states:

> "That in proceedings in the District Court below and in the Supreme Court of the United States the parties who appeared as intervenors in the District Court, being all of the appellees in the action, except the United States of America and the Interstate Commerce Commission, were and are the true parties in interest in said action and did and do have a true and real interest in the proceedings and the outcome thereof, and did take a real and substantial part in the proceedings and in the presentation of issues on behalf of the defendants and appellees, both in the District Court and in the Supreme Court of the United States."

It then clearly appears that the real reason for the motion to tax the full amount of the costs against the railroad appellees is the fact that, because of subsection 5 of Rule 57, appellants may not recoup their costs from the parties they named as defendants.

Rule 57, subsection 2, provides that in case of reversal costs shall be allowed to the appellant, "unless otherwise ordered by the court." But, clearly, appel-

lants, contrary to their assumption, are not by this rule guaranteed recoupment of their costs. The reservation, "unless otherwise ordered by the court", leaves the Court free to deny appellants their costs or to apportion costs, under proper circumstances. Nor is subsection 2, Rule 57, a guarantee that in a case like this, where the United States is the statutory defendant and the losing party, the Court will search for some other party to bear appellants' costs of their appeal.

A fair interpretation of subsection 2 of Rule 57 is that it leaves the taxing of costs to the discretion and judgment of the Court to be exercised fairly and equitably in the light of the circumstances in a particular case. It is the position of the railroad appellees that the taxing of costs against them in this case is neither required nor authorized by any rule of this Court, that the taxing of costs against them would be unreasonable, unjust and inequitable, and that appellants' motion should be denied for the following reasons:

1. Appellants named the United States of America as the defendant in their amended complaint in the District Court because the statute expressly so required and they could not have brought their suit without compliance with the statute. Title 28, U. S. Code, sections 2321, 2322. The complaint also named the Interstate Commerce Commission as a defendant, but did not name the railroads (R. 1). Appellants had, or were chargeable with, knowledge that the rules of this Court do not allow appellants to recoup their costs by taxing them against the United States of America or any agency thereof. While the railroads did intervene in the District Court, were brought by appellants to this Court and took such part as they were allowed or permitted to

take in the proceedings, it could not be true, as alleged by appellants, that the railroad appellees "were and are the true parties in interest in said action", in the face of the statute expressly requiring the naming of the United States of America as the defendant.

2. While it is true that their anxiety over their financial interest caused the railroads to intervene below, this clearly is no reason for substituting them for the statutory defendant, United States of America, merely to enable appellants to recoup their costs. Appellants' suggestion, in paragraph 2 of their motion, that, because the railroads intervened below in the hope of protecting their financial interest, they may now be treated as either superseding or displacing the statutory defendant, United States of America, is unrealistic and misconceives the functioning of the United States in these suits to enjoin orders of the Interstate Commerce Commission. While the intervenors take such part as their inferior position as intervenors permits, the United States is in control of the case and takes the dominant position in its presentation to this Court. For example, the presentation of oral argument in this case by counsel who spoke for the United States and the Commission left the railroad appellees only about 15 minutes, regardless of their financial interest, for presentation of such argument as they could make in that time.

The presence of the United States is no guarantee or assurance that the interests of railroad intervenors in the Commission's orders will be protected or defended by counsel for the United States, even in its dominant position as statutory defendant. Indeed, the United States asserts the prerogative to defend or not to defend an order of the Commission, *I. C. C. v. Oregon-Washington R. Co.*,

288 U. S. 14, and even to change position and confess invalidity of the Commission's order in the middle of the litigation, *Schaffer Transportation Co. v. U. S.*, 355 U. S. 83. Thus, railroads having the financial interest intervene or not at their peril. If they do not intervene, their interest may have no representation, since their position may be abandoned and even attacked as invalid by counsel for the United States; or, if they intervene, they risk having to pay appellants' costs in the event the appeal results in a reversal against the United States as statutory defendant.

3. The Public Service Commission of Utah has long since inflicted far more than enough financial loss on the Utah railroads to avenge the resentfulness of any state against the 38-year-old purpose of Congress to make intrastate traffic contribute a fair proportionate share of revenues essential to maintain an adequate national railway system. As pointed out by this Court in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585, the Congress, by Transportation Act, 1920, for the first time:

> "'* * * imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. * * * Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system.'"

To prevent the states from defeating this national purpose, the Congress gave the Commission power, in what is now Section 13(4) of the Act, to remove unjust discrimination caused by unduly low intrastate rates against interstate commerce by prescribing and requir-

ing observance of adequate intrastate rates "* * * the law of any State or the decision or order of any State authority to the contrary notwithstanding."

From this new Congressional plan, designed for the national welfare of the United States, the Utah Commission promptly "seceded". From that day to this, the Utah commission, as pointed out at pages 20-24 of the railroad appellees' brief in this case, has steadfastly resisted the plan for an adequate national railway system by refusing in every general rate increase authorized by the Interstate Commerce Commission, to permit increases in Utah intrastate rates commensurate with those authorized for interstate traffic. Thus, through one or another strategy or tactic, involving frustration or defeat in whole or in part of the revenue purposes of the 1920 Act, the Utah commission has succeeded in inflicting revenue losses upon the Utah railroads amounting literally to millions of dollars, the amount of such *annual loss* being estimated by the Commission at $1,880,000 in this case (R. 97).

That this intransigeant attitude of the Utah commission is political resistance by a state against Federal sovereignty, rather than a reflection of the desires, demands or insistence of the Utah shippers, who pay all but a very insignificant part of the revenues resulting from increased rates on Utah intrastate traffic, is shown by the Commission's report in *Utah Intrastate Freight Rates and Charges,* 287 I. C. C. 315, where, at page 319, it is pointed out that the Utah commission permitted only half of the Ex Parte No. 166 increase authorized by the Commission in interstate rates on iron ore, and refused to allow the full increase until Utah intrastate shippers

of iron ore, who had not opposed the full increases, gave their expressed consent to the Utah commission to the full amount of the increase authorized by the Commission.

Even in the instant case, as pointed out at pages 35-36 of the railroad appellees' brief, the record shows (negatively, of course) that no shipper or receiver, who actually bears the financial result of increased freight rates, opposed the 15% increase in Utah intrastate rates in this case, except T. C. Taylor (R. 400), who appeared in opposition on behalf of the Ideal Cement Company; that the increase in intrastate rates on coal was opposed not by freight rate payers but by a representative of the Utah Coal Operators' Association, and that the rates on manufactured iron and steel articles and class rates and the increases in rates on ores and concentrates were opposed not by freight rate payers, but by the Utah Citizens Rate Association (an appellant here) and the Utah Mining Association, respectively. In other words, the record before the Commission will be searched in vain for any opposition by any shipper or receiver who actually pays freight rates on the following commodities, which constitute the intrastate freight traffic, (except cement) on which the increases in intrastate freight rates were sought:

Coal
Coke
Iron Ore
Manufactured Iron and Steel Articles
Lead and Zinc Ores, and Ores and Concentrates
Uranium and Vanadium Ores
Waste Materials for Remelting
Clay and Bentonite
Sand and Gravel
Lime Rock
Fuel and Road Oil
Gasoline
Sugar
Wheat
Animal and Poultry Feed
Sheep and Goats
Cattle and Calves
Class and Merchandise Rates

As shown in the Commission's report (R. 105), the railroads' annual revenue loss resulting from refusal of the Utah commission to grant the increases in intrastate rates on iron ore alone was $634,680; that the railroads' revenue loss due to refusal of the Utah commission to permit the sought increases on intrastate movements of coal in Utah was $572,598 annually; and that annual revenue loss to Utah railroads in intrastate movements of lead and zinc ores and concentrates amounts to $85,770 annually. Thus, the total of railroads' annual revenue losses on the three commodities resulting from refusal of the Utah commission to grant the increases, not opposed by any shipper or freight rate payer, amounted to $1,093,048. The amounts of revenue loss from the refusal of the Utah commission to grant increases in rates on other commodities are not shown of record, but, as stated above, the increases were not opposed by any shipper or freight rate payer on any of the com-

modities but only by three professional and perennial objectors, as indicated above. Notwithstanding this lack of appearance or opposition of Utah intrastate *shippers* to the increases needed for revenue purposes, the Utah commission in this case persists in its long resistance against any co-operation in the national plan for maintenance of an adequate railway system, which persistence has already cost the railroads in Utah untold millions of dollars in revenue losses.

The posture of the other appellant, Utah Citizens Rate Association, is not ascertainable from the record. Its Traffic Manager stated (R. 369) that it acted in a consultant capacity for members of that Association, consisting of wholesalers and some manufacturers, but there is no indication that any members of the Association are shippers or receivers who pay and bear freight charges on Utah intrastate freight shipments.

Moreover, appellants' motion for taxation of costs may well be premature, in view of this Court's direction that the cause be remanded to the Interstate Commerce Commission for further proceedings, which undoubtedly will result in a valid order prescribing the same rates prescribed by the order dealt with in this Court's opinion, particularly in view of amendments to Section 13(4) of the Interstate Commerce Act enacted by Transportation Act of 1958 since the Court rendered its decision in this case.

As a matter of unrefined justice and equity, stripped of confusion and thought-crippling technicalities, the railroad appellees submit that they should not be taxed

with the cost of appellants' appeal in this case, and that their motion should be denied.

Respectfully submitted,

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August, 1958.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for railroad appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1958, I served, on behalf of all railroad appellees herein, copies of the foregoing document on the adverse parties herein, as follows:

1. On the Public Service Commission of Utah by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

E. R. Callister, Esq.
Attorney General of Utah
Salt Lake City, Utah

Keith Sohm, Esq.
Commerce Attorney for Utah Public Service Commission
State Capitol
Salt Lake City, Utah

2. On the Utah Citizens Rate Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Calvin L. Rampton, Esq.
721 Continental Bank Building
Salt Lake City, Utah

3. Also on the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice
Washington 25, D. C.

A. Pratt Kesler, Esq.
United States Attorney for the District of Utah
Room 200 Federal Building
Salt Lake City, Utah

4. Also on the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record for Railroad Appellees.